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Report on the *Land (Settled) Estate) Act*

LAW REFORM COMMISSION OF BRITISH COLUMBIA

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LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON THE LAND (SETTLED ESTATE) ACT

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TO THE HONOURABLE S.D. SMITH, Q.C.
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON THE LAND (SETTLED ESTATE) ACT

The *Land (Settled Estate) Act* is based on mid-Victorian legislation aimed at a legal regime where large amounts of land were held in strict settlement. It is complex, intricately drafted legislation, difficult to comprehend and little used today. Like much nineteenth century legislation, it addresses in detail issues relating to procedure which modern legislation would leave to be resolved by the *Rules of Court*, and it defines the kinds of transactions that may be authorised with excruciating particularity. If one were to approach the *Land (Settled Estate) Act* with a view to redrafting it, thirteen pages of the statute book could be replaced with a single section which permits the courts to authorise the exercise of any power necessary for the management or administration of settled land.

But that step is unnecessary since much of what the Act deals with simply has no application in British Columbia. Moreover, in almost every circumstance in which the Act might provide a remedy, the same (or superior) relief is available under another enactment. A relatively minor amendment to the *Trust Variation Act* can make the redundancy of settled estate legislation in British Columbia total.

This Report recommends that such an amendment be made and the *Land (Settled Estate) Act* be repealed.

CHAPTER I INTRODUCTION

At one time, it was common for a person who owned land to wish to control its ownership long after his death, often with a view to ensuring that family holdings remained in the family. Two methods in particular were relied upon to safeguard family holdings. First, property could be transferred to a person in trust, to hold the land for defined purposes and for the benefit of particular persons. Second, limited interests in the land could be conveyed to a series of people. For example, a person might leave land to his son B for his lifetime, and then to B's children.

When ownership of property is structured in either of these ways, it is said to be the subject of a "settlement." The land is "settled." Settlements of land sometimes involve very complex arrangements of title and create a number of problems.

Complex legal arrangements tend to produce prolix legal documents. This was particularly true with respect to 19th century conveyancing documents. Legal documents were of inordinate length for several reasons. Their length was a reflection of the complexity of the law, antiquated techniques of conveyancing, and the difficulties of establishing a good chain or root of title. An additional cause of prolixity was that a solicitor's remuneration depended in part on the length of the document.[1]

In the absence of legislation, powers to deal with settled land had to be conferred by the settlor.[2] This too contributed to the length of legal documents.

To reduce the length of legal documents, and to guard against the accidental omission of necessary powers to deal with settled property, legislation was enacted in England to confer powers commonly included in well drawn settlements.[3] These administrative powers could be exercised with the per-

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1. J. E. R. de Villiers, *Real and Personal Property in England* (1901) 60; *see also* Megarry and Wade, *The Law of Real Property*, (5th ed., 1984), Chapter 6.
2. *Ibid.*
3. *Lord Henry Bruce* v. *Marquess of Ailesbury*, [1892] A.C. 356 (H.L.).

mission of the court. If a settlor did not wish particular powers to be exercised, it was necessary to exclude them in the settlement documents. Before this legislation was enacted, the only remedy available was to petition Parliament to pass a private Act, an expensive procedure.[4] The British Columbia *Land (Settled Estate) Act*[5] is derived from the English settled property legislation.

Today, settlements are unattractive in both England and Canada:[6]

> In Canada the settlement has merely faded away, and the settled estates legislation of British Columbia... no doubt remains because it supplies, or is an authority to the courts to grant, the necessary powers to deal with the land should such a provision be drafted today without those powers.

In those rare cases where land is settled in British Columbia, it would appear that the settlement instruments are well drafted and there is little need for legislation to protect against the accidental omission of powers to deal with the land. Moreover, in most cases modern legislation seems to resolve adequately problems that arise when land is settled and the settlor fails to provide powers necessary for its management or administration. Whether the *Land (Settled Estate) Act* retains any contemporary utility, however lingering or limited, is addressed in this Report.

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4. *Supra*, n. 1, 60.

5. R.S.B.C. 1979, c. 215. The English Parliament did not repeal its settled estates legislation until 1925 (*see* the *Law of Property Act, 1925*; 15 Geo. 5, c. 20 (U.K.)) but it was effectively replaced in 1882 by legislation which also dealt with settled estates, but had a very different purpose. It dealt with a third problem that arose from complex arrangements settling land. Often the settlor of property did not wish the trustee, or persons with limited interests in the land, to exercise powers which would result in the property being transferred or charged. This produced a situation where the trust, or persons with limited interests in the land, could not afford to maintain it. This problem was also addressed by legislation which allowed settled land to be transferred, leased or charged, even where the settlor of the land attempted to exclude the power to do so. The first of these statutes was the *Settled Land Act, 1882*, 45 & 46 Vict. c. 38 (U.K.). Under that Act, the person in possession of the land and others who stood in a similar position could deal with the land, just as if he were the owner in fee simple: Megarry and Wade, *supra*, n. 1, 288. He had to have regard to the interests of all the parties entitled under the settlement, as if he were a trustee for them but he did not require their consent, nor the consent of the court: *Settled Land Act, 1882*, s. 53. His ability to deal with the land could not be limited or defeated by the person who settled the land. If the property was sold, other persons with interests in the land were protected "...by shifting the settlement from the land to the purchase-money which [had] to be paid into court or into the hands of the trustees:" *In re Mundy and Roper's Contract*, [1899] 1 Ch. 275 (C.A.) *per* Chitty L.J. The thrust of this legislation was continued in the English *Settled Land Act (1925)* 15 Geo. 5 c. 18 (U.K.). Neither the 1882 nor the 1925 English legislation was ever brought to Canada. The problems they were designed to deal with never really arose here because of different social and economic conditions and the fact that land was plentiful.

6. Waters, *The Law of Trusts in Canada*, (2d ed., 1984) 888; *see also* Megarry and Wade, *supra*, n. 1, 297.

A. Introduction

It was mentioned in the last chapter that in 19th century England, land might be settled by an instrument which failed to provide adequate powers permitting it to be sold, leased or charged. A number of problems arose. A person who had a life estate in the land, for example, might not wish to reside on it. He could sell his interest, but few people would be willing to buy an interest in land that would last only as long as the vendor lived. Another problem related to the upkeep of property, which had to be paid by the person in possession. Unless he was authorized by the settlement documents, he could not mortgage the land to raise money to maintain it. Since he had only a limited estate, there was little incentive to maintain or improve the land. Few people wished to spend their own money on drainage, reservoirs, watersupply works or maintaining the mansion house for the benefit of those who would enjoy the property after them.[1]

In 1886, British Columbia enacted the *Settled Estates Act*,[2] which provided a solution to these problems. The legislation allowed a life tenant or trustee to raise money by charging the inheritance to pay for improvements. This made a good deal of sense. In effect, the persons who would benefit by the expenditures became responsible for them. This legislation is still on the statute books, largely unchanged except for its title. It is now called the *Land (Settled Estate) Act*.[3] In Canada, only Ontario[4] and New Brunswick[5] have equivalent legislation.[6]

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1. J. E. R. de Villiers, *Real and Personal Property in England* (1901) 60; *see also* Megarry and Wade, *The Law of Real Property*, (5th ed., 1984), Chapter 6.
2. *An Act regarding Leases and Sales of Settled Estates*, S.B.C. 1886, c. 17. This Act was patterned after English legislation introduced between 1856 and 1877: *see Settled Estates Acts* of 1856, 19 & 20 Vict., c.120; 1858, 21 & 22 Vict. c. 77; 1864, 27 & 28 Vict. c. 45; 1874, 37 & 38 Vict. c. 33; 1876, 39 & 40 Vict. c. 30; 1877, 40 & 41 Vict. c. 18. "By the last the consent of the Chancery Division was for some leases rendered unnecessary; and for mining, building and repairing leases the Court was empowered to dispense with the consent of interested parties in certain cases where such consent is unimportant or difficult to obtain;" de Villiers, *supra*, n. 1. *See also Settled Estates Drainage Act, 1840*, 3 & 4 Vict., c. 55 (U.K.); *The Land Drainage Act, 1845*, 8 & 9 Vict., c. 56 (U.K.).
3. R.S.B.C. 1979, c. 215.
4. *Settled Estates Act*, R.S.O. 1980, c. 468.
5. *Trustees Act*, R.S.N.B. 1973, c. T-15, s. 2.
6. In Nova Scotia, the Supreme Court has jurisdiction under the English *Settled Estates Act, 1877* by operation of the Nova Scotia *Judicature Act*: *Re Baugild*, [1954] 3 D.L.R. 586 (N.S.S.C.).

It is important to keep in mind that this legislation has a very limited scope. It was designed to permit instruments settling land to be less prolix, and to guard against the accidental omission of powers to deal with settled land. If the settlor, however, did not wish the persons in possession to have power to deal with the land, all he needed to do was exclude the operation of the legislation:[7]

> But all these Acts could be excluded by a declaration in the settlement. They remedied the difficulties caused by the accidental omission of powers of leasing and sale, but they did not meet the inconveniences arising through their express exclusion, nor did they touch the difficulties of restricted or ill-devised powers.

B. "Settled Estates"

The *Land (Settled Estate) Act* applies to land that is the subject of a settlement.[8] For the purposes of the Act, land may be settled in several ways. The most common of these arrangements are discussed in this section.

1. A Trust

Land may be given in trust to one person to hold for the benefit of others. For example, A leaves property to B in trust for C and D. Under this arrangement, B has legal ownership of the land. C and D each have a beneficial or equitable interest in the land. If the trustee is not empowered by the trust documents to deal with the land, then transactions relating to the land can only be entered into in three circumstances:

(1) if all of the beneficiaries are of full capacity, and consent to the transaction;

(2) if not all of the beneficiaries consent, or not all have the capacity to consent, an application may be made to the court under the *Land (Settled Estate) Act* to authorise a particular transaction;

(3) if not all of the beneficiaries have the capacity to consent, an application may be made to the court under the *Trust Variation Act*[9] to authorise a particular transaction.

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7. de Villiers, *supra*, n. 1.
8. Section 1.
9. R.S.B.C. 1979, c. 413.

2. A Series Of Legal Interests

The owner of land may create a series of limited interests in it. A limited interest is anything less than full ownership. For example, A leaves property to B for life with the remainder to C in fee simple. Under this arrangement, B has the use of the property for his lifetime. After B's death, C receives full ownership of the land. During B's lifetime the land is a settled estate and subject to the provisions of the *Land (Settled Estate) Act*.

3. Statutory Interests

The definition of "settlement" in the Act includes a provincial or federal statute that creates a limited interest or a trust in favour of a person. A "settled estate" is an interest in land which is the subject of a settlement. One example of this kind of settled estate is the life interest in a matrimonial home that one spouse is entitled to when the other spouse dies intestate.[10] It is likely that a transaction relating to the matrimonial home may be made by consent, if all persons entitled to an interest are capable of consenting. Otherwise, transactions relating to the matrimonial home must be approved by the court under the *Land (Settled Estate) Act* or the *Trust Variation Act*.

4. Infants

Any land owned by an infant is deemed to be a settled estate:

> 4. Where an infant in his own right is seised or entitled to land for an estate in fee simple, or any smaller estate, the land is deemed a settled estate under this Act.

This section of the Act was not in the English legislation upon which the British Columbia legislation is based. It was adopted in British Columbia in 1886 when the *Settled Estates Act* was first enacted.[11] It would appear to be part of early legislative efforts to protect infants. The *Infants Act*[12] now serves this function in British Columbia.

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10. *Estate Administration Act*, R.S.B.C. 1979, c. 114; *see Report on Statutory Succession Rights*, (LRC 70, 1983) 39-40; *cf. Aho Estate (Rice)* v. *Kelly*, (1988) 25 B.C.L.R. (2d) 373 (S.C.).
11. *Supra*, n. 2.
12. R.S.B.C. 1979, c. 196.

C. Operation of the Legislation

At common law, a person who received less than full ownership of land under a settlement could not deal with the land unless empowered to do so under the terms of the settlement. The *Land (Settled Estate) Act* permits settled land to be sold, leased or charged. Some of these things can be done by the life tenant, with the consent of other persons having interests in the land. Other powers can be exercised only by the court having "...due regard to the interest of all parties entitled,"[13] or when the court thinks an order is "necessary and expedient, in the interest of the parties concerned."[14]

1. Leases

A life tenant may grant a lease without judicial authorisation or the consent of the other parties, so long as it does not exceed 21 years and the "best rent" is obtained.[15] In all other cases, the court must authorise the lease of a settled estate.[16] The Act lists the maximum periods for which certain kinds of leases may be granted.[17] For example, an agricultural or occupational lease may not exceed 21 years. A mining lease may not exceed 40 years. The court, however, can authorise a lease for a longer period of time, if that is in the best interests of the persons benefiting by the settlement and justifiable in terms of local custom.[18] The lessor is required to obtain the "best rent."[19]

2. Sales And Charges

The court may order that all or part of the settled estate be sold, mortgaged, or charged to raise funds to prevent its deterioration, increase its productive power or release the prop-

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13. Section 6.
14. Section 17; or "proper and consistent with regard for the interests of all parties entitled under the settlement:" section 21.
15. Section 48.
16. Section 6.
17. Section 6(a).
18. *Ibid.*
19. Section 6(b). The test is whether the rent was fair and reasonable at the time the lease was entered into. It is of no consequence that at some later date the rent is below market value: *Morris* v. *Cairncross*, (1907) 14 O.L.R. 544, 550 (H.C.J.). In *Hunter* v. *Doan*, [1942] O.W.N. 291 (H.C.J.), however, in the absence of evidence as to what was the best rent when the lease was made, it was held that a lease entered into one year earlier could not have been for the "best rent" because the defendant was sub-letting it at a profit. The lease was set aside. A long term lease which prejudices the remainderman must strictly comply with the Act's provisions if it is to be upheld; *cf. National Trust Co.* v. *Shore*, (1908) 16 O.L.R. 177 (H.C.J.).

erty from an encumbrance, charge or lien.[20] The Act also gives the court the ability to order that proceeds be invested for the benefit of the parties.[21] Basically, the Act permits the court to authorise the conversion of land that is subject to a settlement into some other form, which remains subject to the terms of the settlement, altered insofar as necessary.

3. Consent

The court may exercise powers granted under the *Land (Settled Estate) Act* with the consent of parties with an interest in the land. If a party does not consent, the court may still grant the application:[22]

> **32.** An order may be made on any application, notwithstanding that the consent of any person as stated above has not been obtained or has been refused; but the court in considering the application shall have regard to the number of persons who consent to or dissent from the application, or who submit or are deemed to submit their rights or interests to be dealt with by the court, and to the estates or interests which the persons claim to have in the estate, and every order of the court made on such an application has the same effect as if all the persons had been consenting parties.

4. Generally

The above discussion touches on aspects of the *Land (Settled Estate) Act* at a most general level. The Act is comprehensive in its provisions. It addresses mineral rights; the dedication of streets, roads and other necessary works; proceedings to protect the land; the manner in which any dealing with the land is to be carried out; the procedure for bringing an application under the Act; the manner in which notice is to be given; and many other incidental and ancillary issues.

In this Report, our concern is not so much what the Act permits to be done, but how it is being used. That is the subject of the next section.

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20. Section 17; the sale of all or part of the settled estate or its timber is also authorised under section 21(1).
21. Section 21(3).
22. Section 32; *see also* section 29.

D. Proceedings Under the Act

There has been little judicial consideration of the Act in British Columbia.[23] It has been used on occasion, however, in uncontested matters.

A search[24] was conducted of the Vancouver Registry files for the period 1964-1974. Details of this search are to be found in Appendix A to this Report. Basically, the applications made in this time period fall into three categories:

(1) Applications by life tenants to authorise transactions relating to settled land;

(2) Applications by trustees, administrators or executors to authorise dealings with land held in trust;

(3) Applications to approve transactions relating to land owned by infants.

Several facts disclosed by this survey are noteworthy. First, only 50 applications involving settled estates were made in the eleven year period surveyed. On average, 4.5 applications were made a year over the whole of this period. However, only 11 applications were made from 1970 to 1974, representing an average of 2.2 applications per year. The reduction in applications is likely due to the introduction of the *Trust Variation Act* in 1968, and the reduction of the age of majority in 1970, from 21 to 19 years of age. These changes in the law are discussed in more detail elsewhere in this Report.

It would appear that, in British Columbia, very few problems with respect to settled estates arise and, when they do, other legislation and principles of law deal adequately with the problems that the *Land (Settled Estate) Act* was originally designed to resolve. For the most part, the *Land (Settled Estate) Act* has been replaced by more modern legislation.

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23. The only reported B.C. decisions under the Act appear to be: *Homfray* v. *Homfray* (1936) 51 B.C.R. 287 (S.C.); *In re Ash Estate* (1897) 5 B.C.R. 672 (S.C.); *In re Harry Howard* (deceased) (1911) 16 B.C.R. 48 (C.A.). None of these cases considered the Act in any detail. No cases have been reported under the *Land (Settled Estate) Act* in the "B.C. Decisions: Civil Cases," a cumulative index and abstracting service of all reasons for judgment of the B.C. County Courts, Supreme Court and Court of Appeal. It began publication in 1974.

24. Up until 1974, the Index to the Vancouver Registry files listed cases that dealt with particular legislation by reference to the statute. Since 1974, however, this method of indexing has been abandoned. Consequently, our search was confined to applications made up to 1974.

E. Developments since 1886

Since the *Land (Settled Estate) Act* was enacted in the 19th century, common law developments and more recent legislation have largely overtaken its provisions. The following discussion is divided into a consideration of settled estates that arise in three general areas: as a result of a trust, a limited legal interest and ownership by an infant.

1. TRUSTS

(a) Variation by Consent

The terms of a trust can always be set aside when the beneficiaries unanimously consent.[25] A problem arises, however, where the beneficiaries of a trust are unable to consent.[26] A person who is not of full age, for example, cannot consent. Similarly, the trust may benefit people who are not yet born, or who, by reason of conditions established by the trust, are not yet ascertained. In these cases, it is not possible to obtain the consent of all beneficiaries.[27]

(b) Inherent Jurisdiction

The courts have asserted an inherent jurisdiction to intervene in the management or administration of a trust where certain difficulties have arisen which cannot otherwise be removed.[28] The court's inherent jurisdiction, however, is very limited,[29] as Professor McClean has observed:[30]

> With respect to the inherent jurisdiction, the basic rule is that the courts have no power to authorize any variation of the terms of a trust, even though this be approved by all adult beneficiaries and would be clearly beneficial to infants and other beneficiaries not capable of assenting on their own behalf to any changes. To this rule there are two exceptions. Under the emergency jurisdiction, the courts may authorize a deviation from the administrative terms of a trust if it is shown that an emergency, unanticipated by the settlor, is threatening the very existence of the trust. In the exercise of the maintenance jurisdiction the court may, out of income directed to be accumulated or to be used to pay debts, direct payments to be made to beneficiaries who will eventually receive

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25. *Saunders* v. *Vautier*, (1841) 4 Beav. 115, 41 E.R. 482.
26. Waters, *The Law of Trusts in Canada* (2d ed., 1984) 1055.
27. Waters, *supra*, n. 26, 1058.
28. *Engelman* v. *Engelman* (1986) 23 E.T.R. 30 (B.C.C.A.); *see also Halsbury's Laws of England*, (4th ed.) vol. 48, 512-3; Waters, *supra*, n. 26, 1060-5.
29. *Chapman* v. *Chapman*, [1954] A.C. 429 (H.L.).
30. A.J. McClean, "Variation of Trusts in England and Canada," (1965) 43 Can. B. Rev. 181, 208.

> some benefit under the trust if they are in need of money to prevent them from starving or to maintain themselves in a manner appropriate to their expectations under the trust...
>
> The inherent jurisdiction does not, therefore, afford any assistance to beneficiaries who wish to re-arrange their trust so as to ensure themselves greater benefits from it. They are at the mercy of the settlor, and, given that the trust provisions are not illegal or impossible, the courts, but for the two rather narrow exceptions, will enforce them to the full, even though this does not afford maximum benefit to the beneficiaries and indeed even if it proves detrimental to them.

Often, the beneficiaries of a trust seek to vary it in order to minimize the impact of taxation or to adjust the trust to withstand economic changes. In the absence of legislation, the court has little or no ability to alter a trust for the purposes of estate planning.

(c) Trust Variation Act

(i) Overview

In 1958, in response to the recommendations of the English Law Reform Committee,[31] legislation was enacted in England to permit the variation of trusts.[32] Almost identical legislation, now called the *Trust Variation Act*,[33] was adopted in British Columbia in 1968.[34]

The *Trust Variation Act* permits the court to approve "any arrangement" by,[35]

> varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

The only limitation on this power is that the arrangement must benefit those persons on whose behalf the court is asked to consent.[36]

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31. Law Reform Committee, *Sixth Report (Court's Power to Sanction Variation of Trusts)*, Cmnd. 310.
32. *Variation of Trusts Act, 1958*, 6 & 7 Eliz. II, c. 53.
33. R.S.B.C. 1979, c. 413.
34. S.B.C. 1968, c. 57. This Act was based on the *Uniform Variation of Trusts Act*, adopted by the Uniform Law Conference of Canada. Most Canadian jurisdictions have enacted similar legislation.
35. Section 1. The Act applies to property held in trust under a "will, settlement or other disposition."
36. *Ibid.*

(ii) General Purpose

In *Re Sandwell & Co. and Royal Trust Corp. of Canada*[37] the general purpose of trust variation legislation was described as follows:[38]

> To say that [the provisions of the will] are binding and unalterable is to deny the very purpose and intent of the Trust Variation Act which is to approve, if the court sees fit, an amendment even though it offends the original terms of the trust. At common law, the rule that a trust may be varied by all beneficiaries of the trust, actual and contingent, provided they are 'sui juris' and consent, was established by Saunders v. Vautier (1841), 41 E.R. 482. In this case some of the deferred beneficiaries are not located and some of the contingent beneficiaries are not identified, perhaps not even born, and are not of full legal capacity. Hence the Trust Variation Act extends the common law rule and empowers the court in its discretion to approve the amendment of the trust on behalf of such persons, in this case the deferred participants and the contingent beneficiaries. The only impediment or fetter on the court's discretion contained in the above-quoted s.2 is to the effect that the court shall not approve an arrangement on behalf of such persons unless the carrying out of that arrangement appears to be for the benefit of those persons.

(iii) Arrangements

An "arrangement" under the Act covers any proposal which may be put forward relating to a trust.[39] The kinds of arrangements that may be put forward fall generally into three categories. The arrangement may involve:

(1) varying the trust;

(2) revoking (or terminating) the trust;

(3) enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

Consequently, transactions relating to a trust which may be approved under the *Land (Settled Estate) Act*, may also be approved under the *Trust Variation Act*.

(iv) Who May Apply?

Anyone can put forward a proposed "arrangement."[40] Usually beneficiaries of full capacity consent to a particular arrangement and an application is made to the court to ap-

37. (1985) 17 D.L.R. (4th) 337 (B.C.C.A.).
38. *Ibid.*, 342.
39. *Re Steed's Will Trusts* [1960] c. 407.
40. *Re Irving* (1975) 11 O.R. (2d) 443, 66 D.L.R. (3d) 387, (Ont. H.C.) *per* Pennell J.

prove the arrangement on behalf of those beneficiaries unable to consent.

A single person can bring the application[41] and he need not have obtained the consent of other beneficiaries before doing so. But as a matter of practice the applicant will have struck a bargain before seeking court consent.[42]

(v) "Benefit"

An arrangement must benefit those persons upon whose behalf the court has been asked to grant approval. The ordinary meaning of the word "benefit" suggests that the positions of persons unable to consent must be improved, or at least protected, by a proposed arrangement. If the *Trust Variation Act* were interpreted in this way, few arrangements would be approved.

Certainly, a trust may be varied to the advantage of all, but there are many situations where the interests of the beneficiaries come into conflict to some extent. The courts have approved arrangements which are of general benefit, although some persons will receive less under the arrangement than under the original terms of the trust. This is done by adopting a liberal definition of the word "benefit," particularly if the court is asked to approve an arrangement on behalf of remote contingent interests. Benefit, for example, need not consist of a financial benefit.[43] *Re Kovish*[44] concerned a trust in favour of family members and their children. An arrangement was proposed under which the trust would be terminated and the funds applied to a family business. Under this arrangement, the children would be deprived of any interest at all. The arrangement was approved, nevertheless, since they would be benefited by the family business.[45]

In some cases, however, courts have declined to approve arrangements apparently on the sole ground that the arrangement would diminish the financial benefit to persons unable to consent.[46] The courts take into account three princi-

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41. *Re Steed's Will Trusts*, *supra*, n. 39.
42. Waters, *supra*, n. 26, 1074.
43. *Re Zekelman* [1971] 3 O.R. 156, 19 D.L.R. (3d) 652.
44. (1985) 18 E.T.R. 133 (B.C.S.C.).
45. *See also Re Sandwell & Co. and Royal Trust Corp. of Can.*, *supra*, n. 37; *Re Tweedie*, [1976] 3 W.W.R. 1 (B.C.S.C.).
46. *Kunater* v. *Royal Trust Corp. of Can.* (1980) 23 B.C.L.R. 287 (S.C.); *Farrington* v. *Rogers*, (1980) 19 B.C.L.R. 373 (S.C.).

pal considerations, when determining whether to approve an arrangement:[47]

> First, does [the arrangement] keep alive the basic intention of the testator? Second, is there a benefit to be obtained on behalf of infants and of all persons who are or may become interested under the trusts of the will? And, third, is the benefit to be obtained on behalf of those for whom the Court is acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?

Professor Waters has described the concept of "benefit" under the Act as follows:[48]

> In order perhaps to put it beyond question that financial benefit is not the sole or essential concern which the legislature has in mind in conferring this variation jurisdiction upon the courts, Manitoba has amended its original legislation to spell out what "benefit" can be taken to include. It includes an arrangement which "would enhance the financial, social, moral or family wellbeing of that person" on behalf of whom the court is asked to consent. This accords with and reflects the interpretation expressly put upon the word by the courts, but it cannot solve the relative weighting problem. At the end of the day in every case these issues have to be left to the values and sensitivities of the court, wearing the mantle of the sage, intelligent adult assessing, no doubt with his own sensitivity, where, if his own concerns were in question, his best interests lie.

(vi) Varying Beneficial Interests v. Enlarging Administrative Powers

The cases do not seem to distinguish between arrangements which will affect the beneficial interests of persons unable to consent and those which relate to a trustee's ability to deal with the trust property. Nevertheless, a practical distinction between these two kinds of arrangements exists.

Certainly some administrative powers will allow the trustee to affect the trust or its property in some way. The exercise of a particular administrative power may differ little in result from a direct variation of the beneficial interests under the trust. In other cases, however, the exercise of an administrative power will not affect beneficial interests at all and the primary concern is to protect or enhance the property which is subject to the trust.

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47. *Re Irving*, *supra*, n. 40, 450, *per* Pennell J. This *dicta* was endorsed by the B.C. Court of Appeal in *Re Sandwell*, *supra*, n. 37.
48. *Supra*, n. 26, 1081.

In *Tanner* v. *Tanner*,[49] an application was made to terminate a trust under which a crown lease was held in favour of an infant. The trustee was the infant's father. As a term of the lease, it was necessary to construct a home on the land, but in order to do so, funds would have to be borrowed and secured by a mortgage against the land. The trust was created without conferring any administrative powers on the trustee.

The application was refused since the arrangement to terminate the trust would deprive the infant beneficiary of any interest. Further submissions, however, were invited on an arrangement which would provide the trustee with appropriate administrative powers.[50]

(vii) A Limitation on the Court's Jurisdiction

The *Trust Variation Act* serves a particular function. It allows the court to consent to an arrangement on behalf of persons who are unable to do so for themselves. If all of the beneficiaries are capable of consenting, the Act cannot be relied upon to approve an arrangement to which a beneficiary objects.[51] Under the *Land (Settled Estate) Act*, on the other hand, the court may authorize a transaction relating to settled land even where a party refuses his consent.[52]

(d) Summary

It would appear that if the *Land (Settled Estate) Act* is repealed, the *Trust Variation Act* will fill the void for most trust settlements. In one respect, however, the *Land (Settled Estate) Act* confers a broader jurisdiction on the courts than does the *Trust Variation Act*. Under the *Land (Settled Estate) Act*, the court may authorize a transaction relating to a settled estate even where a party objects to it. Under the *Trust Variation Act* the court has no jurisdiction if all of the parties are capable of consenting to an arrangement.

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49. (1980) 20 B.C.L.R. 185 (S.C.).

50. *See*, however, *In Re Lotzkar*; *Montreal Trust Co. of Can.* v. *James*, (1984) 57 B.C.L.R. 364 (S.C.) where an application was made to allow the lease of land held in trust. The application was based on the court's inherent jurisdiction. It is difficult to see why the application was not made pursuant to the *Trust Variation Act* or the *Land (Settled Estate) Act*. It appears that all beneficiaries were capable of consenting to the arrangement. Perhaps one or more of them refused to consent.

51. Unless the beneficiary who objects comes within section 1(b): *see* Waters, *supra*, n. 26, 1070-71.

52. Section 32.

2. INFANTS

Where the infant has a legal interest in land, transactions relating to it are governed by the *Infants Act*.[53] If, for example, it is desirable to sell the land, the Public Trustee may apply to the court on behalf of the infant for an order to dispose of all or part of the land.[54] If the land is to be leased, the infant or his guardian may apply to the court for an order authorising the lease.[55] Moreover, the infant's guardian may enter into contracts on behalf of the infant.[56]

There is no need to retain the *Land (Settled Estate) Act* in order to ensure that there is power to deal with an interest in land held by an infant. Moreover, the *Land (Settled Estate) Act* is unnecessary to protect the infant's interests. Infants are already well protected under the provisions of the *Infants Act*.

3. LEGAL INTERESTS

It would appear that the *Land (Settled Estate) Act* remains of use in only one area: to give life tenants the ability to deal with land. No other legislation permits a life tenant to enter into a transaction relating to the land. A life tenant may only deal with land to the extent that he has been empowered by the person creating the life estate. If the life tenant has not been so empowered, he must rely upon the provisions of the *Land (Settled Estate) Act*.

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53. R.S.B.C. 1979, c. 193. Equitable interests in favour of an infant are dealt with under the *Trust Variation Act*.
54. Section 1.
55. Section 27.
56. Section 31. If the agreement involves consideration of $10,000 or less, it requires the approval of the Public Trustee. In all other cases, the approval of the court is required.

A. Repeal of the *Land (Settled Estate) Act*

In the Commonwealth, the thrust of reform has generally been to repeal settled estates legislation and ensure that other legislation consolidates the various administrative powers that are necessary with respect to settled land.[1]

Certainly, the *Land (Settled Estate) Act* should not be retained in its current form. It is complex, intricately drafted legislation, difficult to comprehend and little used today. Like much nineteenth century legislation, it addresses in detail issues relating to procedure which modern legislation would leave to be resolved by the Rules of Court, and it defines the kinds of transactions that may be authorised with excruciating particularity. If one were to approach the *Land (Settled Estate) Act* with a view to redrafting it, all of its provisions could be replaced with a single section which permitted the courts to authorise the exercise of any power necessary for the management or administration of settled land.

It is our view that the *Land (Settled Estate) Act* should be repealed. That conclusion leads to a consideration of whether there is a need to enact legislation to provide for any of the matters currently addressed by the *Land (Settled Estate) Act*.

B. Infants

Clearly, there is no need to provide additional legislation to protect infants who hold land, or to empower the courts to authorise transactions relating to land owned by infants. These issues are already addressed by the *Infants Act*.[2]

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1. New Zealand (*Trustee Act 1956*, Repr. Stat. N.Z. 1977, No. 61), Western Australia (*Trustees Act, 1962*, W. Austl. Acts 1962, No. 78), and Queensland (*Trusts Act 1973*, Queensl. Stat. 1973, No. 24), for example, have repealed their settled estates legislation.

2. One correspondent suggested an amendment to s. 1(2) of the *Infants Act*, which provides:

> (2) The Public Trustee may petition the court on behalf of infants possessed or entitled to land in the Province, for an order to dispose of all or part of the land. The court may proceed in a summary manner on affidavits to inquire into the merits of the application.

It was suggested that the *Infants Act* should be revised to permit other interested parties (in addition to the Public Trustee), "such as a private trustee or a guardian," to make an application under s. 1. This would appear to be a useful idea. There may be circumstances where the Public Trustee will not wish to assume the burden of applying on behalf of an infant, and it would be appropriate for another party, such as a parent, to bring the application instead. This issue, however, is outside the scope of this Report.

C. Trusts

Ensuring that trustees have adequate administrative powers to deal with land held in trust is dealt with by the *Land (Settled Estate) Act*, the *Trustee Act*[3] and the *Trust Variation Act*.[4]

It should be recognized that the *Trustee Act* is as outmoded as the *Land (Settled Estate) Act*. The Ontario Law Reform Commission observed:[5]

> ...trusts drafted today are very different from those that were drawn when the powers contained in the present Ontario Trustee Act were first included in the Act, and that as a result some of the powers now contained in the Act have little relevance to contemporary circumstances. Moreover, the fact that these statutory powers have not been revised for so long, without apparent complaint from the profession, suggests that this area is not one that is urgently in need of attention.

In British Columbia, legislation has adopted two approaches to ensuring that trustees have sufficient powers to administer and manage trust property. The *Trustee Act* and the *Land (Settled Estate) Act* attempt to list comprehensively powers that may be exercised by a trustee, although in some cases the court's approval is required. In contrast, the *Trust Variation Act* does not list powers that may be conferred upon a trustee. Essentially, any administrative power which is necessary, if it will benefit the persons on whose behalf the court is asked to consent, may be conferred upon a trustee.[6]

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3. R.S.B.C. 1979, c. 414.
4. R.S.B.C. 1979, c. 413.
5. *Report on the Law of Trusts*, (1984) 234.
6. Granting the courts a general power to ensure that trustees have adequate administrative powers is consistent with legislation enacted in England in 1925 when settled estates legislation was finally repealed. The English *Trustee Act, 1925* (15 Geo. 5 c. 19 (U.K.)) provides as follows:

> Power of court to authorise dealings with trust property
>
> **57.** (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
>
> (2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.
>
> (3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

Similar legislation has been enacted in Alberta, New Brunswick, Nova Scotia, the Northwest Territories and the Yukon. The need for a provision of this nature was largely removed with the introduction of variation of trusts legislation.

In keeping with the approach of trustee legislation over the past century, modern legislation might be introduced which provides that, unless excluded, a comprehensive list of familiar powers be read into the trust instrument. This option calls for a full review of the *Trustee Act*. It is the approach adopted by the Ontario Law Reform Commission.[7]

The question is whether it is necessary to undertake such an exercise in order to repeal the *Land (Settled Estate) Act*. It should be observed that the administrative powers contained in the *Trustee Act* and the *Land (Settled Estate) Act* are seldom relied upon.[8] More often, the trust instrument is drafted to provide sufficient administrative powers. If a trustee lacks a particular administrative power, a transaction relating to the trust may still take place if the beneficiaries are all of full capacity and consent. If not, then in most cases an application may be made to the court pursuant to the *Trust Variation Act*.

A concern to which we have given some consideration is whether there are certain administrative powers which, if omitted in error, should be exercisable without court approval. However, where an instrument settling land has been incorrectly drawn, or where a variation not contemplated by the settlor is desired, it would seem that in principle court scrutiny is called for.

In our view, consequently, the *Land (Settled Estate) Act* may be repealed without revising the *Trustee Act* to ensure that trustees have adequate administrative powers. It may be desirable at some time to review the *Trustee Act*. Such a review, however, would be unaffected by the decision to repeal the *Land (Settled Estate) Act*.

It was mentioned in the last chapter that the *Trust Variation Act* has one limitation which is not present in the *Land (Settled Estate) Act*. Under the *Trust Variation Act*, the court may not approve an arrangement if all of the beneficiaries are capable of consenting and one or more does not consent.

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7. *Supra*, n. 5.
8. This observation was made by the Ontario Law Reform Commission with respect to their *Trustee Act*, *supra*, n. 5. The British Columbia Act is similar to, and we have no reason to suspect that it is any more useful than, the Ontario version. Advice on this issue is welcome. With respect to the *Land (Settled Estate) Act*, our empirical research discloses that between 1964 and 1974 the Act was relied upon sporadically, and with decreasing frequency. *See* Appendix A.

Under the *Land (Settled Estate) Act*, on the other hand, the court has jurisdiction to authorise a transaction even if some of the beneficiaries object to it.

In terms of policy, it would appear that the position adopted by the *Trust Variation Act* is correct. It is difficult to see why the court should be able to override the wishes of a beneficiary who is of full capacity. The concern is that there be ability to deal with the trust property. If all beneficiaries are capable of consenting to a variation of the trust, there should be a certain reluctance to force the consensus of the majority on the minority. In any event, this is a limitation on the *Trust Variation Act* which does not appear to have caused problems, and applies generally to arrangements proposed under that Act, not just to arrangements relating to the administration or management of a trust.

D. Legal Interests

The only area of utility of the *Land (Settled Estate) Act* relates to administrative powers needed when land is held in a series of limited legal interests. It was mentioned earlier that in the absence of the *Land (Settled Estate) Act*, there is no means to confer on the life tenant powers to deal with the land that were not included in the original settlement.

In this context, two options for reform have been adopted in various jurisdictions. First, some antipodean jurisdictions have consolidated settled estates legislation in legislation similar to the British Columbia *Trustee Act*. Where there is a succession of life interests in the absence of a trust, the life tenant has the powers conferred on trustees.[9]

In contrast, legislation might provide a comprehensive scheme for dealing with limited legal interests. That is the option endorsed by the Ontario Law Reform Commission:[10]

> We are aware that, as noted previously, Western Australia, Queensland, and New Zealand have addressed this issue by inserting in their trustee legislation a provision that enables a life tenant, or other person with an interest less than a fee simple, to exercise all the powers conferred upon trustees by that legislation. The Commission has concluded, however, that the revised Act should not contain such a provision.

9. *See, e.g., Trustees Act, 1962*, (W. Austl.) 11 Eliz. II, 1962, No. 78, s. 27(4).
10. *Supra*, n. 5, 236.

> Rather, we are of the view that it would be more appropriate to deal with the common law settlement of land in the context of a comprehensive review of land law. Accordingly, we recommend that the Settled Estates Act should be amended so as to exclude from its operation settlements of land by way of trust. We further recommend that that Act, insofar as it confers administrative powers in relation to common law settlements of land, should remain in force, pending a review of the basic principles of land law.

It is uncommon today for people to create limited legal interests. For that reason, it would appear undesirable to enact legislation dealing with administrative powers that may be relied upon in relation to common law settlements of land.

The option of providing that a life tenant may exercise any of the administrative powers available to a trustee has merit. There is an admirable economy about this route for reform. It is not a particularly useful thing to do, however, if, as in British Columbia, the legislation that confers these administrative powers is decades out of date.

For these reasons, it is our view that an amendment should be made to the *Trust Variation Act*, to provide that a life tenant may apply to vary the terms of the settlement. It should be sufficient to provide that for the purposes of the *Trust Variation Act*, a settlement of land which involves limited legal interests shall be deemed to be a trust in favour of persons incapable of consenting to an arrangement. In this way, the court will have adequate powers to deal with any administrative issue that may arise with respect to life tenants, and others having limited legal interests in land.

This approach leaves a life tenant worse off than under the *Land (Settled Estate) Act* in one respect. Currently, the life tenant may lease the lands for up to 21 years without seeking court approval.[11] Repealing the *Land (Settled Estate) Act* would remove his ability to do that. If a life tenant wishes to lease the lands, he must seek the approval of the court. This change to the law strikes us as sound. Suppose the life tenant has not long to live, and maliciously leases his interest for 21 years. This would certainly prejudice others entitled to the land. Requiring the court's approval for a lease will protect them.

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11. Section 48.

It may be argued with some conviction that the law should provide separate rules to deal with the administration of legal and equitable interests, and that it is inappropriate to amend the *Trust Variation Act* to resolve problems faced by both trustees and life tenants. Having said that, it should be observed that precisely the same administrative problems arise in the context of administering trust property as in administering land which is subject to a series of limited legal interests. Paralleling the position of a life tenant with that of a beneficiary of a trust is a pragmatic response to problems that rarely arise.

One further matter must be addressed. It is useful if remedial legislation is placed in a statute which is obviously linked to the issues it addresses. It is unlikely to be obvious that the *Trust Variation Act*, if that vehicle for reform is adopted, logically deals with issues relating to successive legal interests in land. For that reason, the *Trust Variation Act* should be retitled the *Trust and Settlement Variation Act*.

CHAPTER IV SUMMARY

A. Overview

In this Report, the Commission has examined the provisions of the *Land (Settled Estate) Act* and found that it has little contemporary utility. We recommend that it be repealed. Problems addressed by it are, for the most part, adequately dealt with by the *Infants Act* and the *Trust Variation Act*.[1] An amendment to the *Trust Variation Act* is required to ensure that, where a person settles land in a series of limited legal interests, an application may be made under that Act in any circumstance where the settlor neglects to confer on the life tenant adequate administrative powers to deal with the land.

B. Recommendations

The Commission recommends that:

1. *The* Land (Settled Estate) Act *be repealed.*

2. *The* Trust Variation Act *be amended by adding a new section comparable to the following:*

> *(1) The court may approve an arrangement under this Act relating to land the ownership of which is the subject of a legal life interest.*
>
> *(2) For the purposes of (1),*
>
> *(a) the land is deemed to be held by the life tenant in trust for himself and the holders of successive interests in the land; and*

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1. A point upon which comment was invited in the Working Paper related to the *Trust Variation Act*. Our focus has been on the *Land (Settled Estate) Act*. The *Trust Variation Act* has been considered only to the extent that it appears to replace the need for settled estates legislation. We have, for the most part, not questioned whether the *Trust Variation Act* is in need of revision. Nevertheless, some aspects of the *Trust Variation Act* do not appear to be entirely satisfactory. In particular, the Act fails to distinguish between situations that involve varying or terminating beneficial interests and those that involve the enlarging of powers to manage or administer trust property. Different considerations arise in each of these situations and it may be argued that the uniform approach adopted by the Act is inappropriate. One submission on the Working Paper favoured amending the Act so that a court could order the variation of a trust even if the beneficiaries were not unanimously in favour. That is an issue, however, which must be pursued in a project which has as its focus trust variation legislation.

(b) the beneficiaries of the trust are deemed to be incapable of consenting to the arrangement.

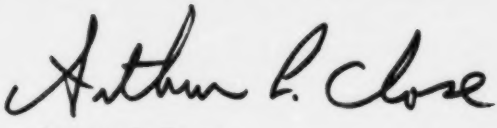
3. The Trust Variation Act *be renamed the* Trust and Settlement Variation Act.

C. Acknowledgments

We wish to thank those who took the time to consider and respond to the Working Paper which preceded this Report.

We also wish to acknowledge the contribution of Tim Delaney, who carried out the initial research for this project.

Finally, we wish to express our thanks to Thomas G. Anderson, Counsel to the Commission. Subject to the Commission's direction, he prepared the Working Paper and this Report.



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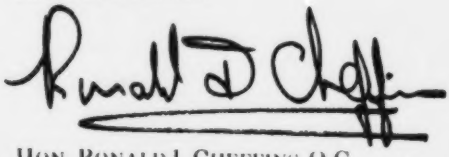

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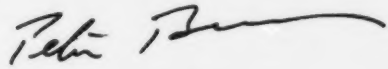

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APPENDICES

APPENDIX A

Land (Settled Estate) Act: Court Registry Data

Though there has been little judicial consideration of the Act in British Columbia, it has been used on occasion in uncontested matters. The following analysis is derived from a survey of unreported petitions, covering the period 1964 - 1974. Only 50 applications concerning settled estates were made during this period. We had access to the files for 48 of these applications.

1. Life interest or application by executor or trustee

In 35 of the 48 files the petition was brought either by a person with a life interest or an executor or trustee, of a settled estate:

1964: Celona x327; Radway x506; Eckersley x702; Hilborn x1033;

1965: Greig x72; Shears x574; Cave x822;

1966: Cropp x909; Margoks x921;

1967: Hnatuk x2; Eklof x396; Kwan x735;

1968: Quan x70; Hill et al x190; Bradburn x263; Slade x353; Mitchell x352; Wickman x601; Weir x113;

1969: Atkins x118; Kurp x492; Beresh x645; Wells x725; Erickson x735;

1970: no files

1971: Rothstein x1287; Mee x1681; Prossegger x2283; Bower x2944; Creuzot x3037; Hodgson x3428; Gillales x3664;

1972: no files

1973: no files

1974: Parsons x6222; Hermani x6974;

In each case, the petitioner received court authorization to sell, lease, or otherwise dispose of the property. Often the applicant was the parent of the beneficiary. The majority of these applications dealt with trust property and it would appear that the same result could have been achieved under the *Trust Variation Act*. It is difficult to say with certainty, but the absence of applications in 1970, 1972 and 1973 may reflect the fact that more matters relating to the alteration of trusts or their administration were being brought under the *Trust Variation Act*, which was enacted in British Columbia in 1968.

2. Application by or on behalf of an infant

In the remaining 13 files the petition was brought by spouses who owned land in a joint tenancy:

1964: Haddon x506.

1965: Balzer x404; Mitchell x1128.

1966: West x325; Allanson x36; Wallace x739; Yasenuik x972/1108.

1967: no files

1968: Mecham x331; Dunn x362; Stewart x724.

1969: Willington x262.

1970: no files

1971: no files

1972: no files

1973: Glasson x5329.

1974: Singh x6832.

In each case one of the spouses (usually the wife) was an infant. Section 4 of the *Land (Settled Estate) Act* deems land transferred to an infant to be transferred on trust for him as a settled estate. If the spouses, for example, wished to mortgage their property, they had to apply to the court for authorization to do so. Interestingly, in all but 2 of the 13 cases, the petitioner would today be considered an adult. The age of majority was changed from 21 to 19 in 1970.[1] That is why there were only two applications by infants after 1969.

1. *See* the *Age of Majority Act*, R.S.B.C. 1979, c. 5, s. 1.

APPENDIX B

LAND (SETTLED ESTATE) ACT

R.S.B.C. 1979, CHAPTER 215

Interpretation

1. In this Act

"court" means the Supreme Court;

"settled estates" means all interests in land which are the subject of a settlement; and for the purpose of this Act an entailed interest after the possibility of issue is extinct is deemed a tenancy for life;

"settlement" means an Act of Parliament or of the Legislature, or a deed, agreement, will or other instrument, under which an interest in land stands limited to or in trust for any persons by way of succession, and includes an instrument that affects the estate of any of those persons exclusively.

Estates in remainder or reversion

2. An estate or interest in remainder or reversion not disposed of by the settlement and reverting to a settlor or descending to the heir of a testator, is deemed an estate coming to that settlor or heir under the settlement.

Rules for determining settled estates

3. In determining what is a settled estate under this Act, the court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the settlement taking effect.

Land of infants

4. Where an infant in his own right is seised of or entitled to land for an estate in fee simple, or any smaller estate, the land is deemed a settled estate under this Act.

5. [Repealed 1982-7-67, proclaimed effective September 7, 1982.]

Leases of settled estates subject to conditions

6. The court may, having due regard to the interests of all parties entitled and subject to this Act, authorize leases of settled estates or of a right affecting them, for any purpose, whether involving waste or not, provided that

(a) the lease is made to take effect in possession at or within one year after it is made, and is for a term of years not exceeding, for an agricultural or occupation lease, 21 years; for a mining lease, or a lease of water mills, way leaves, water leaves, or other rights or easements, 40 years; for a repairing lease 60 years, and for a building lease 99 years; but the lease, except an agricultural lease, may be for a term of years the court directs, where the court is satisfied that it is the usual custom of the district and beneficial to the inheritance to grant the lease for a longer term than the term specified in this paragraph;

(b) the lease is for the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be payable half yearly or more often, without taking a fine or other benefit in the nature of a fine; except that in a mining lease, a repairing lease or a building lease, a peppercorn rent, or a rent smaller than the rent ultimately to be made payable, if the court directs, may be made payable during any part of the first 5 years of the lease;

(c) if the lease is of earth, coal, stone, or mineral of timber land or a timber limit, a certain portion of the whole rent reserved is set aside and invested, being, so long as the person entitled to receive the rent is because of his estate or the settlement entitled to work, for his own benefit, the earth, coal, stone or mineral or to cut and market the timber, 1/4 of that rent, otherwise 3/4 of the rent, and provision shall be made in the lease to ensure the application of the portion by appointing trustees or otherwise as the court deems expedient;

(d) a lease, other than a lease of timber land or a timber limit, shall not authorize the felling of trees except as far as necessary to clear ground for agriculture, buildings, excavations or other works authorized by the lease;

(e) each lease shall be by deed, and the lessee shall execute a counterpart of it, and every lease shall contain a condition for re-entry on nonpayment of the rent for a period of 28 days after it becomes due or for a shorter period to be specified.

Leases may contain special covenants

7. Subject and in addition to the conditions mentioned, every lease shall contain covenants, conditions and stipulations the court believes expedient in the special circumstances of the lease.

Parts of settled estates may be leased

8. The power to authorize leases conferred by this Act extends to authorize leases either of the whole or any part of the settled estate.

Leases may be surrendered and renewed

9. Leases, whether granted under this Act or otherwise, may be surrendered either to obtain a renewal of them or not, and the power to authorize leases conferred by this Act extends to authorize new leases of the whole or any part of the land in a surrendered lease.

Power to authorize leases to extend to preliminary contracts

10. The power to authorize leases conferred by this Act extends to authorize preliminary contracts to grant those leases, and any of the terms of those contracts may be varied in the leases.

Mode in which leases may be authorized

11. The power to authorize leases conferred by this Act may be exercised by the court either by approving a particular lease or by ordering that powers of leasing, in conformity with this Act, be vested in trustees in the manner mentioned in this Act.

Evidence on application to authorize leases

12. When application is made to the court either to approve a lease or to vest leasing powers in trustees, the court shall require the applicant to produce evidence it shall deem sufficient to enable it to ascertain the nature, value and circumstances of the estate, and the terms and conditions on which a lease ought to be authorized.

Direction of court as to lessor, and effect of lease

13. The court, where it approves a lease or contract for a lease, shall direct what person shall execute it as lessor; and the lease or contract takes effect as if he was at the time of the execution absolutely entitled to the whole interest bound by the settlement, and had immediately afterwards settled it according to the settlement, and so as to operate, if necessary, by way of revocation and appointment of the use or otherwise, as the court directs.

Powers of leasing may be vested in trustees

14. Where the court thinks it expedient that any general powers of leasing any settled estates should be vested in trustees, it may order that the power vest accordingly either in the existing trustees of the settlement or in other persons, and those powers, when exercised by the trustees, take effect as if the power vested in them had been originally contained in the settlement, and so as to operate, if necessary, by way of revocation and appointment of the use or otherwise, as the court directs. In every such case the court may, if it thinks fit, impose conditions as to consent or otherwise on the exercise of that power, and the court may also authorize the insertion of provisions for the appointment of new trustees to exercise those leasing powers.

Conditions not to be inserted in orders

15. In orders under this Act for vesting leasing powers in trustees or other persons, no conditions shall be inserted requiring that the leases authorized be submitted to or be settled by the court or conform with a model lease deposited with the court, except where the parties applying for the order desire to have a condition of that kind inserted, or where it appears to the court that there is some special reason rendering the insertion of such a condition necessary or expedient.

Conditions where inserted may be struck out

16. (1) In all cases of orders in which a condition mentioned in section 15 is inserted, an interested party may apply to the court to alter and amend the order by striking out that condition, and the court has full power to alter it accordingly, and the altered order has the same validity as if it had originally been made in its altered state.

(2) It is not obligatory for the court to act under this section in a case where, on the evidence, it appears that there is a special reason that the condition is necessary or expedient.

Power to court to order sale or mortgage on settled estates

17. If it appears to the court that it is necessary or expedient, in the interest of the parties concerned, to release the settled estate or a portion of it from an encumbrance, charge or lien on it, or to expend money on the settled estate to prevent its deterioration in value or to increase its productive power, the court may, if it deems it proper and consistent with regard for the interests of all parties who are or may be entitled under the settlement, order that money required for any of these purposes, and for costs and expenses in relation to them, be paid by a sale or mortgage of or charge on any part of the settled estate, or be raised and paid out of the rents and profits of the settled estate or any part of it, or out of any money or investment representing money liable to be laid out in the purchase of land to be settled in the same manner as the settled estate, or out of the income of the money or investment, or out of any accumulation of rent or income. This section applies to all settled estates whenever constituted.

Order for mortgage may be made on application for sale or lease

18. The order may be made whenever an application is made to the court for a sale or lease of the settled estate, notwithstanding that the application does not expressly declare that the authority to mortgage will be applied for.

Conditions which mortgage must contain

19. Every such mortgage shall contain conditions, covenants and stipulations the court believes proper in the special circumstances of the case.

Court may appoint person to execute mortgage for absent trustee

20. When trustees who are seised or possessed of an estate in trust are out of the jurisdiction of the Province, the court may make an order appointing a person within the Province to execute the mortgage for the trustees, and the execution by the person appointed has the same effect as if the trustees had executed the mortgage.

Court may authorize sales of settled estates and of timber

21. (1) The court may, if it believes it proper and consistent with regard for the interests of all parties entitled under the settlement, and subject to this Act, authorize a sale of the whole or any part of a settled estate, or of timber, except ornamental timber, growing on a settled estate. Every sale shall be conducted and confirmed in the same manner that, by the rules and practice of the court, is required for the sale of land sold under a decree of the court.

(2) An order under this section may be general and not confined to a particular sale. Where the settled estate or any part of it is subject to encumbrances, the court may, with a due regard to the interests of all parties entitled under the settlement at any time, on the application of an interested party and with the consent of all encumbrancers, approve any scheme for the extinguishment of encumbrances, whether by an immediate, gradual or deferred sale, and for the management of the estate or a portion of it subject to the encumbrances pending realization, and so that a sale, if believed advisable and all proper parties consent, may be made to a

company formed to acquire the encumbered estate for a consideration payable in whole or in part in fully paid up shares of the company.

(3) The court may sanction the setting aside of a portion of the sale proceeds to satisfy wholly or in part, pending extinguishment of the encumbrances, the claims and interest of any party entitled to the income, or make any other provision for that party in addition to the expense of management and other costs and expenses, and may make all necessary orders and give all necessary directions for carrying out the scheme and for binding all parties.

(4) The power conferred authorizes the court at any time, after a scheme has been approved, if believed advisable in the interests of all parties, and on the application of an interested party and with the same consent as required above, to approve an amendment or alteration of a scheme, or to cancel it and substitute for it some other scheme.

Proceedings to protect settled estates

22. The court may, if it believes it proper and consistent with a regard for the interests of all parties who are or may be entitled under the settlement, and subject to this Act, sanction any action, defence, petition to the Legislative Assembly, parliamentary opposition or other proceedings appearing to the court necessary to protect a settled estate, and order that all or any part of the costs and expenses in relation to it be raised and paid by means of a sale or mortgage of or charge on all or any part of the settled estate, or out of any money or investment representing money liable to be laid out in the purchase of interest in land to be settled in the same manner as the settled estate, or out of the income of that money or investment, or out of any accumulations of rents, profits or income.

Consideration for land sold for building purposes may be a fee farm rent

23. When land is sold for building purposes, the court may, if it sees fit, allow any part of the consideration to be a rent issuing out of that land, which may be secured and settled in a manner the court approves.

Minerals may be excepted from sales

24. On the sale of land, any earth, coal, stone or mineral may be excepted, rights or privileges may be reserved, and the purchaser may be required to enter into covenants or submit to restrictions which the court believes advisable.

Court may authorize dedication of any part of settled estates for streets, roads and other works

25. The court may, if it believes it proper and consistent, with regard to the interests of all parties entitled under the settlement, and subject to this Act, direct that any part of a settled estate be laid out for streets, roads, paths, squares, gardens or other open spaces, sewers, drains or watercourses, either to be dedicated to the public or not; and the court may direct that the part laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in other trustees on such trusts for securing the continued appropriation of it for the purposes stated above, and

with provisions for the appointment of new trustees as the court believes advisable.

Power to direct the carrying out of necessary works, and to provide for payment by sale or mortgage, or out of principal money or income

26. Where part of a settled estate is directed to be laid out for a purpose stated above, the court may direct that streets, roads, paths, squares, gardens or other open spaces, sewers, drains or watercourses, including all necessary or proper fences, paving, connections and other incidental works be made, and that any of the related expenses be paid by a sale or mortgage of or charge on any part of the settled estate, or be raised and paid out of the rents and profits of the settled estate, or out of any money or investment representing money liable to be laid out in the purchase of interests in land to be settled in the same manner as the settled estate, or out of the income of that money or investment, or out of any accumulations of rents, profits or income. The court may also give directions it thinks advisable for repair or maintenance of streets, roads, paths, squares, gardens or other open spaces, sewers, drains or watercourses, or other works, out of any rents, profits, income or accumulation during a period of time the court thinks advisable.

Sales and dedications to be effected under direction of court

27. On every sale or dedication, the court may direct which person shall execute the deed of conveyance; and the deed executed by that person takes effect as if the settlement had contained a power enabling that person to effect the sale or dedication, and so as to operate, if necessary, by way of revocation and appointment of the use or otherwise, as the court directs.

Application to exercise powers conferred by this Act

28. A person entitled to possession or receipt of the rents and profits of a settled estate for a term of years determinable on his death, or for an estate for life or a greater estate, and also a person entitled to possession or receipt of the rents and profits of a settled estate as assignee of a person who, but for the assignment, would be entitled to the estate for a term of years determinable with any life, or for an estate for any life or a greater estate, may apply to the court by petition in a summary way to exercise the powers conferred by this Act.

With whose consent application to be made

29. (1) Subject to the subsequent provisions of this Act, an application to the court must be made with the consent

(a) of the tenant in tail under the settlement, if there is one in existence and of full age, or if there is more than one tenant in tail, then the first of those tenants in tail and all persons in existence having a beneficial estate or interest under the settlement prior to the estate of that tenant in tail, and all trustees having an estate or interest on behalf of an unborn child prior to the estate of that tenant in tail;

(b) in every other case, of the persons in existence having a beneficial estate or interest under the settlement, and all trustees having an estate or interest on behalf of an unborn child.

(2) Where an infant is tenant in tail under the settlement, the court may dispense with the consent of any person entitled, whether beneficially or otherwise, to an estate or interest subsequent to the estate tail of the infant.

Notice to be given to persons who do not consent to or concur in the application

30. (1) Where on an application under this Act the consent of any such person as stated above has not been obtained, notice shall be given to that person in a manner the court directs, requiring him to notify within a time specified in the notice, whether he assents to the application, or submits his rights or interests so far as they may be affected by the application to be dealt with by the court and every notice shall specify to whom and in what manner the notification is to be delivered or left.

(2) In case no notification is delivered or left in accordance with the notice and within the time limited by it, the person to or for whom the notice has been given or left shall be deemed to have submitted his rights and interests to be dealt with by the court.

Court may dispense with notice under certain circumstances

31. Where on an application under this Act the consent of any such person as stated above has not been obtained, and if that person cannot be found, or if it is uncertain whether he is living or dead, or if it appears to the court that notice cannot be given to the person without expense disproportionate to the value of the subject matter of the application, then the court, if it thinks fit, either on the ground that the rights or interests of that person are small or remote or similar to those of any other person or on any other ground, may, by order, dispense with notice to that person, and that person shall be deemed to have submitted his rights and interests to be dealt with by the court.

The court may dispense with consent, having regard to the number and interests of parties

32. An order may be made on any application, notwithstanding that the consent of any person as stated above has not been obtained or has been refused; but the court in considering the application shall have regard to the number of persons who consent to or dissent from the application, or who submit or are deemed to submit their rights or interests to be dealt with by the court, and to the estates or interests which the persons claim to have in the estate, and every order of the court made on such an application has the same effect as if all the persons had been consenting parties.

Petition may be granted without consent saving rights of nonconsenting parties

33. The court may, if it thinks fit, give effect to any petition, subject to and so as not to affect the rights, estate or interest of any person whose consent has been refused, or who has not or is not deemed to have submit-

ted his rights or interests to be dealt with by the court, or whose rights, estate or interest ought in the opinion of the court to be excepted.

Notice of application and service

34. Notice of an application to the court under this Act shall be served on all trustees who are seised or possessed of an estate in trust for a person whose consent to the application is required, and on any other parties who in the opinion of the court ought to be served, unless the court thinks fit to dispense with that notice.

Notice of application to be advertised if court directs

35. (1) Notice of an application to the court under this Act shall, if the court directs, but not otherwise, be inserted in those newspapers that the court directs.

(2) A person, whether interested in the estate or not, may apply to the court for leave to be heard in an application made to the court under this Act; and the court may permit the person to appear and be heard in an application, on terms as to costs or otherwise and in a manner it thinks fit.

No application under this Act granted where a similar application has been rejected by Parliament or Legislative Assembly

36. The court shall not grant an application under this Act in a case where the applicant or an entitled party has previously applied to either the Parliament of Canada or the Legislative Assembly of the Province, for a private Act to effect the same or a similar object, and that application has been rejected on its merits.

Notice of exercise of powers given or registered as directed by court

37. The court shall direct that sufficient notice of the exercise of powers conferred on it by this Act be placed on the settlement or on any copies of it or registered in the land title office in the district in which the land affected by an order of the court is situated or otherwise recorded in any way it thinks proper, in all cases where it appears to the court to be practicable and expedient to prevent fraud and mistake.

Payment and application of money arising from sales or set aside out of rent reserved on mining or timber leases

38. All money to be received on a sale under this Act, or to be set aside out of the rent or payments reserved on a lease of earth, coal, stone, minerals or timber land or a timber limit, may, if the court thinks fit, be paid to a trustee it approves, or otherwise it shall be paid into court ex parte the applicant in the matter of this Act. The money shall be applied, as the court directs, to

(a) the discharge or redemption of an encumbrance affecting the interests in land in respect of which the money was paid, or affecting any other interests subject to the same uses or trusts;

(b) the purchase of other interests in land to be settled in the same manner as the interests in respect of which the money was paid; or

(c) the payment to a person becoming absolutely entitled.

Trustee may apply money in certain cases without application to court

39. The application of the money as stated above may, if the court directs, be made by the trustees, if any, without an application to the court, or otherwise on an order of the court on the petition of the person who would be entitled to possession or to the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

Until money can be applied it shall be invested and interest and dividends paid to parties entitled

40. Until the money can be applied, it shall be invested as the court directs, and the interest and dividends of that investment shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

Court may direct application of money in respect of leases or reversions as appears just

41. Where purchase money paid into court under this Act has been paid in respect of a lease for a life or lives or years, or for a life or lives and years, or any estate in land less than the whole fee simple, or of a reversion dependent on any such lease or estate, the court may, on the petition of a party interested in the money, order that it shall be laid out, invested, accumulated and paid in a manner the court may consider will give to the parties interested in the money the same benefit from it as they might lawfully have had from the lease, estate or reversion in respect of which the money shall have been paid, or as near to it as may be.

Court may exercise powers repeatedly, and may extend powers contained in settlement

42. The court may exercise any of the powers conferred on it by this Act, whether the court has already exercised any of the powers conferred by this Act in respect of the same property or not; but those powers shall not be exercised if an express declaration that they shall not be exercised is contained in the settlement; but the circumstance of the settlement containing powers to effect similar purposes shall not preclude the court from exercising any of the powers conferred by this Act, if it thinks that the powers contained in the settlement ought to be extended.

Court not to authorize any act which could not have been authorized by the settlor

43. This Act shall not be construed to empower the court to authorize a lease, sale or other act beyond the extent to which, in the opinion of the court, it might have been authorized in the settlement by the settlor.

Acts of court under this Act not to be invalidated

44. After the completion of a lease, sale or other act under the authority of the court, and purporting to be under this Act, it shall not be invalidated on the ground that the court was not empowered to authorize it, except that no lease, sale or other act is of any effect against a person as herein mentioned whose consent ought to be obtained, or who ought to be served with notice, or in respect of whom an order dispensing with service

ought to be obtained in the case where consent has not been obtained and service has not been made or dispensed with.

Costs in discretion of court, with power to sell or mortgage

45. The court may, if it thinks fit, order that all or any costs and expenses of all or any parties of and incidental to an application under this Act shall be a charge on the interests in land which are the subject of the application, or on any other interests in land included in the same settlement and subject to the same limitation. The court may also direct that those costs and expenses be raised by sale or mortgage of a sufficient part of those interests, or out of the rents or profits of them, with the costs and expenses to be taxed as the court directs.

Rules and orders

46. General rules and orders of court for carrying out the purposes of this Act, and for regulating the procedure and practice of the court to which this Act relates, and for regulating the fees payable to the Crown, and the fees and allowances to all officers and solicitors of the court for these matters, shall be made by the Lieutenant Governor in Council, and until rules and orders are expressly made the rules and orders of the court apply to proceedings under this Act. When there are no rules distinctly applicable to a particular proceeding, then those rules and orders shall be followed as closely as the case permits.

Rules and orders to be laid before Parliament

47. All general rules and orders made as stated above shall be laid before the Legislative Assembly within 15 days after they are made, if the Legislative Assembly is sitting, or, if not, within 15 days after the commencement of the next ensuing session.

Tenant for life or for any greater estate may grant leases for 21 years

48. A person entitled to the possession or to the receipt of the rents and profits of a settled estate for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right, unless the settlement contains an express declaration that it is not lawful for the person to make such a lease and also any person entitled to the possession or to the receipt of the rents and profits of an unsettled estate as tenants by the courtesy, or in dower, without an application to the court, may lease it or any part of it for a term not exceeding 21 years, to take effect in possession at or within one year next after the making of it,

(a) if every lease is made by deed, and the best rent that can reasonably be obtained be reserved without a fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion;

(b) if the lease is not made without impeachment of waste, and contains a covenant for payment of the rent, and other usual and proper covenants as the lessor thinks fit, and also a condition of reentry on nonpayment of the rent for a period of 28 days after it becomes due, or for a shorter period to be specified in that behalf; and

(c) if a counterpart of every deed of lease is executed by the lessee.

Against whom leases are valid

49. Every lease authorized by section 48 is valid against the person granting it and all other persons entitled to estates subsequent to the estate of that person under the same settlement if the estates are settled.

Evidence of execution of counterpart lease by lessee

50. The execution of a lease by the lessor shall be deemed sufficient evidence that a counterpart of the lease has been executed by the lessee as required by this Act.

Provisions as to infants, mentally disordered persons and insolvents

51. All powers given by this Act, and all applications to the court under this Act, and consents to and notifications respecting those applications, may be executed, made or given by, and all notices under this Act may be given to guardians on behalf of infants, and by or to committees on behalf of mentally disordered persons and by or to trustees or assignees of the property of bankrupts, debtors in liquidation or insolvents; but in the case of infant or mentally disordered tenants in tail, no application to the court or consent to or notification respecting an application may be made or given by a guardian or committee without the special direction of the court.

Court powers not limited

52. (1) [Repealed 1985-68-56, effective December 13, 1985 (B.C. Reg. 392/85).]

(2) No settlement restraining anticipation shall prevent the court from exercising, if it thinks fit, any of the powers given by this Act, and no exercise shall occasion any forfeiture, notwithstanding anything contained in the settlement to the contrary.

53. [Repealed 1985-68-56, effective December 13, 1985 (B.C. Reg. 392/85).]

Removal of infant disability

54. A married person, whether of the age of majority or not, may make or consent to any application under this Act.

No obligation created by this Act to make or consent to any application

55. This Act does not create an obligation on a person to make or consent to an application to the court or to exercise a power.

Tenant for life, etc., entitled to possession and profits notwithstanding encumbrances

56. For the purposes of this Act, a person is deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or encumbered either by himself or by the settlor,

or otherwise, to any extent; but the estates or interests of the parties entitled to such a charge or encumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits unless they concur in that them.

Exception where reversion vested in Crown

57. This Act does not authorize the sale or lease beyond the term of 21 years of a settled estate, where the reversion is vested in the Crown.

Notice to Public Trustee

58. (1) Notwithstanding any other provision of this Act, where the right, estate or interest of a minor or a mentally disordered person in a settled estate may be affected by an application under this Act, notice in writing of the application together with a copy of the material filed in support of the application shall be served on the Public Trustee not less than 10 days before the date of the application.

(2) The Public Trustee is entitled to appear and be heard on the application and entitled to any costs the court may order.

(3) The Lieutenant Governor in Council may, by regulation, prescribe fees payable to the Public Trustee for investigating an application under this Act.

APPENDIX C

TRUST VARIATION ACT

R.S.B.C. 1979, CHAPTER 413

Court approval of variation

1. Where property is held on trusts arising before or after this Act came into force under a will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting;

(b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of a specified description or a member of a specified class of persons;

(c) any person unborn; or

(d) any person in respect of an interest of his that may arise by reason of a discretionary power given to anyone on the failure or determination of an existing interest that has not failed or determined,

any arrangement proposed by any person, whether or not there is any other person beneficially interested who is capable of assenting to it, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

Benefit to parties interested

2. The court shall not approve an arrangement on behalf of a person coming within section 1 (a), (b) or (c) unless the carrying out of it appears to be for the benefit of that person.

Public Trustee

3. Where a person comes within section 1 (a) or (c), or where a person coming within section 1 (b) or (d) is a minor or is mentally disordered, notice in writing of an application under this Act together with a copy of the material filed in support of it shall be served on the Public Trustee not less than 10 days before the date of the application.

Court appearances

4. The Public Trustee is entitled to appear and be heard on the application and is entitled to any costs that the court orders.

Fees

5. The Lieutenant Governor in Council may prescribe a fee or scale of fees payable to the Public Trustee for investigating an application under section 1.